SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 726.

THE MISSOURI AND KANSAS INTERURBAN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF OLATHE, KANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 16, 1911.

The said plaintiff in error states and alleges that the said district court committed grievous error in its decision and ruling upon said demurrer as follows:

3 1st. The said District court erred in sustaining the said demurrer to the said petition.

2nd. The said district court erred in refusing to overrule the said demurrer to the said petition.

Plaintiff in Error attaches to this, its petition in error, a transcript of the record in said cause, duly attested by the Clerk of the District Court of Johnson County, Kansas, which said transcript is made a part of this petition in error, and marked Exhibit "A".

Wherefore the said Plaintiff in Error prays this court to reverse the decision and ruling of the said district court, and remand said cause with directions to the said district court to overrule the said demurrer.

FRANK DOSTER,
OGG & SCOTT, AND
S. T. SEATON,
Attorneys for Plaintiff in Error.

Filed Oct. 17, 1908.
D. A. VALENTINE,
Clerk Supreme Court.

4 Filed Oct. 17, 1908. D. A. Valentine, Clerk Supreme Court.

In the District Court of Johnson County, Kansas.

No. 16,202.

THE MISSOURI & KANSAS INTERURBAN RAILWAY COMPANY, Plaintiff,
vs.
THE CITY OF OLATHE, Defendant.

Petition.

1st. The Plaintiff, the Missouri & Kansas Interurban Railway Company, complains of the Defendant, the City of Olathe, and for cause of action against said Defendant alleges that it is a corporation duly organized and existing as such under the laws of the State of Kansas, and duly authorized by the Charter Board of said State to form itself into such corporation to construct and operate a line of railway within the State of Kansas, commencing at the line between said State and the State of Missouri and extending to and into the City of Olathe in Johnson County said State.

2nd. The Defendant, the City of Olathe, is a municipal corporation of the State of Kansas, organized and existing as a city of the second class in said state.

3rd. The Plaintiff having in contemplation the construction and operation of the line of railway for which it had received its aforesaid charter authorization, and having constructed and being in the

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operation of its line of railway from the state line between the states of Missouri and Kansas to a village called Lenexa in Johnson County in said State, and being desirous of further constructing and operating its said line from said village of Lenexa to and into the City of Olathe applied to the Mayor and City Council of said City for a franchise to construct and operate its said line into said city, and the said Mayor and Council of said city being willing to grant said franchise did at a meeting held by them on the 21st day of May, 1906, by ordinance of that date, duly enacted, authorize said plaintiff to extend and operate its said line of railway into said
5 city, and to utilize certain of the streets of said city, in said ordinance named, for the purpose of laying its tracks and operating its cars thereover, designating as one of said streets a street known and called by the name of Loula Street, said ordinance specifying in detail the terms and conditions under which said franchise rights so granted should be exercised and enjoyed, a copy of which said ordinance is hereto attached and made a part hereof.

4th. By section nine of the aforesaid ordinance the plaintiff as the grantee of said franchise was required within thirty days after the passage of said ordinance to file its acceptance of the same in the form of a resolution of its Board of Directors, attested by its corporate seal, and plaintiff avers that in compliance with said ordinance it did on June 4th, 1906, present to said city and file with the clerk thereof its acceptance of the terms and conditions of said ordinance, a copy of which acceptance is attached hereto and made a part hereof.

5th. Plaintiff further avers that thereafter, to-wit, on June 8th, 1906, the aforesaid ordinance was duly published in the Olathe Republican Tribune the official paper of said city.

6th. Plaintiff further avers that thereafter the defendant duly recognized, ratified and affirmed the due passage, enactment and publication of said ordinance and the contract rights secured thereby to the plaintiff by its aforesaid acceptance in writing of the terms and provisions of said ordinance, and in and about said authorization and affirmance, and as said ratification and affirmance on the 18th day of June, 1906, did notify said Plaintiff of certain requirements and conditions which it claimed said plaintiff was under to said city because of and in connection with the due passage, enactment and publication of said ordinance, a copy of which notice with said claim against plaintiff in said notice is hereto attached and made a part hereof.

6 7th. Plaintiff further avers it duly performed all and singular the conditions and requirements imposed on it by said ordinance at the time and in the manner required by the terms thereof, and thereby became fully vested with a franchise right to construct and operate its line of railway in the said City of Olathe, and was on the 25th day of June, 1906, in the full enjoyment of all the contract privileges and franchise rights conferred on it by said ordinance.

8th. Plaintiff further avers that notwithstanding its rights in the premises, the said defendant refused to permit said plaintiff to enter said city for the purpose of constructing and operating its line of

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railway as provided for in said ordinance, and to enjoy the franchise, rights and privileges by said ordinance conferred, and therein did on the 25th day of June, 1906, enact a certain ordinance repealing the ordinance hereinbefore mentioned of May 21st, 1906, and from thence on did refuse to allow the said plaintiff the enjoyment of its aforesaid franchise, and contract rights and privileges, and did refuse to approve plaintiff's bonds, plans and specifications and repudiated said contract, a copy of which ordinance of repeal is hereto attached and made a part hereof.

Amendment.—Which said repealing ordinance was duly published in the Olathe Republican Tribune, the official paper of said city.

9th. Said plaintiff further avers that between the date of its acceptance of the provisions of said ordinance of May 21st, 1906, and the passage of said repealing ordinance of June 25th, 1906, it did in pursuance of the franchise rights and privileges conferred on it by said ordinance of May 21st, 1906, expend large sums of money in extending its line of railroad from Lenexa, Kansas, to the City limits of Olathe for the purpose of utilizing the benefits and advantages inuring to it under said ordinance of first mentioned date, and also did pay certain sums of money, to-wit, the sum of $1,150.00 as attorney fees, and fees to the Board of County Commissioners of Johnson County as right of way commissioners to condemn a right of way across certain lands reaching to and in the direction of Loula Street, and cost of newspaper publication of the notices of said condemnation proceedings, and the cost of surveying its line of railway into and through the City of Olathe and along the route
7 designated in said franchise, and making necessary plans, maps, profiles and other engineering work in connection therewith, the items of which said expense are as follows: Attorney's fees $25.00, County Commissioners fees $30.00, fees for newspaper publication $95.00, cost of engineering work $1000.00.

All of the above work was done within the city limits of the City of Olathe, and all of said money expended by reason of and under the terms of said ordinance, and this plaintiff was and is damaged by reason of the wrongful acts of said defendant in repealing said ordinance of May 21, 1906, and in preventing the plaintiff from fulfilling its part of the contract in the said sum of $1150.00, no part of which has been paid, and there is now due from said defendant to said plaintiff the said sum of $1150.00 its damages so sustained as aforesaid and for which plaintiff demands judgment.

10th. Said Plaintiff avers that by a subsequent ordinance enacted by said city on January 28th, 1907, it was given a franchise right to construct and operate its line of railway into said city over and along Park street in said city and that it has done so, but said plaintiff further avers that on account of the repeal by said defendant of the aforementioned franchise ordinance of May 21st, 1906, and said defendant's refusal to allow to it the benefit of the franchise rights and privileges by said ordinance conferred it was delayed in the construction of its line of railway into said City of Olathe for the period of eight months, and during said

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time lost the tolls and revenues it would otherwise have earned and collected, which said tolls and revenues so lost by it would have been during said period of the full sum of $25,000.00.

That on or about October 1st, 1906, plaintiff completed its line of railway to the corporate limits of said city, and commenced the operation of said line from Kansas City, Missouri, to a point at the said city limits about one mile from the central business portion of said city, and from said date to about the 1st day of June, 1907, operated its said line only to said city limits. That from said 1st day of June, 1907, to the present time it has operated its said line into said city to the central business portion thereof, and since the operation of said line to said central business portion of the city its tolls and revenues have increased $100.00 per day or more, which daily increase it would have earned during the period of time it was wrongfully denied the exercise of its franchise
8 rights under the aforementioned ordinance of May 21st, 1906.

11th. Plaintiff further avers that in order to procure money to construct and equip its said line of railway it was obliged to issue and sell its securities in the form of bonds secured by mortgage on its said railway, and the tolls and income from the operation thereof, and at and after the time of the enactment and publication of said ordinance of May 21st, 1906, and the acceptance thereof by plaintiff and the subsequent ratification thereof by defendant, it was marketing its said securities for par, but immediately on the wrongful acts of defendant in repealing said ordinance it came to be suspected and believed by purchasers of such kind of securities that plaintiff did not have any rightful franchise to enter said city and operate its railway therein, and that because thereof the value of its line of road and the assurance of profitable tolls and income from the operation thereof were not as great or certain as they otherwise would be, and that in consequence thereof its said mortgage securities were not as valuable as they otherwise would be; by reason of which plaintiff was unable to sell its said securities at the price it had been obtaining but was compelled to and did sell them at a much lower price.

Said plaintiff avers that defendant knew that plaintiff was obliged to and was selling its said mortgage securities for the purpose of raising money to construct and equip its said line of railway, and knew that the value of its said securities was in part based on its franchise right to construct and operate its line of railway through and into said city.

Plaintiff further avers that by reason of defendant's wrongful acts as aforesaid it was compelled to discount the remainder of its mortgage securities negotiated by it for the construction and equipment of its said line in the aggregate of $50,000.00 below the value at which they had been selling and were justly worth.

Wherefore, Plaintiff prays judgment against the defendant for the sum of $76,150.00, its damages as aforesaid sustained, and for the costs of this suit.

FRANK DOSTER,
OGG & SCOTT,
Attorneys for Plaintiff.

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(Endorsed:) Consent given to file this amended petition this 26 day of October 1907. C. L. Randall, Att'y for Defendant. Filed this 26th day of October 1907. Geo. W. Folmer, Clerk of Court.

9 Published in the Olathe Republican Tribune, June 8, 1906.

Ordinance No. —.

An Ordinance granting to the Missouri and Kansas Interurban Railway Company the right to operate and maintain an Interurban Railway to be operated by electricity or other motive power except steam, over and along certain streets in the city of Olathe, Kansas.

Be it ordained by the Mayor and Councilmen of the City of Olathe, Kansas:

SEC. 1. The right, privilege and authority is hereby granted to the Missouri and Kansas Interurban Railway Company, a railway corporation duly organized under the laws of the State of Kansas, hereinafter called the grantee, its successors and assigns, to construct, maintain and operate for the term of twenty years from and after publication of this ordinance a standard guage Interurban Railroad to be operated by electricity or other motice power except steam, in, over and along certain streets and avenues of the City of Olathe, Kansas, to-wit:

1st. Santa Fe Avenue from Locust St. to Mahaffie Street.
2nd. Park Street from Oak Street to Mahaffie Street.
3rd. Loula Street from Ohio Street to Mahaffie Street.

The election by the grantee to use one of the said streets for the purpose aforesaid within six months from the date of the granting of the franchise shall act as an abandonment of the other two for the purpose of operating said railroad over and along the same, but the grantee shall continue to have the right to cross any or all such streets or any other streets and alleys in the city of Olathe necessary to be crossed in the exercise of its rights hereunder. The grantee having elected to use any one of the aforesaid routes to Mahaffie Street shall have its right to construct, maintain and operate its railroad south upon and along Mahaffie Street to Loula Street, thence west along and upon Loula Street to Kansas Avenue, thence north on Kansas Avenue to the Public Square.

Said railroad to consist of a single track laid as nearly as may be in the center of the street occupied by it, with necessary turn out, "Y's" passing tracks, fixtures and appurtenances needful in the construction and operation of such railway, and the grantee shall have the right to construct for the purpose of transmitting power to the repulsion of its cars, overhead trolley systems,
10 suspended on posts placed along the curb lines of such streets in said city by the public, provided that such grant shall be subject to all the restrictions and regulations hereinafter contained.

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SEC. 2. The rights herein granted shall relate to a railroad to be operated by electricity or other motive power except steam, steam as a motive power being expressly prohibited under the terms of this ordinance.

SEC. 3. Said grantee, by its acceptance of this ordinance, agrees to construct, operate and maintain an interurban railway system upon and along the streets and avenues of said city of Olathe designated in Section I of this ordinance and to some point connecting with the street railway system of Kansas City, Missouri, and to provide the necessary cars for carrying passengers and freight and shall maintain in continuous service a schedule for the passage of cars in each direction between points within said city of Olathe and between Olathe and the city of Kansas City, Mo., with not less frequency than every hour for not less than sixteen hours each day, and such additional cars for such additional hours as the public service may at any time reasonably demand. It is expressly stipulated that the grantee shall not haul, live stock on its railroad within the city limits, and that the carriage of all freight or express within or into the city shall be subject to such regulations as the Mayor and Council may be ordinance prescribe.

SEC. 4. The grantee shall bring the streets on which their tracks are laid to the grade as now or hereafter established by the city at their own expense, and for the whole width thereof, and shall also grade all intersecting streets and alleys the whole width thereof, and to such distance and in such manner as will permit easy and convenient approach to the street occupied by the grantee's tracks, and the surface of said railway company's tracks shall conform to the grades now established or as hereafter changed. Whenever the line of said railway company's tracks traverse any street upon which pavement is constructed it shall be the duty of said company, after laying its tracks, to restore such paving wherever injured or destroyed, taken up or removed to its previous condition, and whenever the said city of Olathe shall hereafter pave, repave or repair any street upon which said line of railway is constructed it shall be the duty of such railway company to construct or pay the cost of construction of such paving or repairing to a total width
11 in area along the street so occupied of eight feet for each track occupying such street, according to specifications adopted by said council and to maintain such paving in good condition during the time such track may remain on such street, except when the duty of maintenance of such pavement may rest upon any contractor constructing such pavement; provided that the said railway company may construct along its tracks detachable curbs or blocks or bricks of sufficient width to enable said company to take up or repair its tracks or rails without disturbing any pavement of cement or asphaltic character used in any such streets. Upon the final determination of the city council to pave such street it shall cause the city clerk to give a written notice of such determination to said railway company, and said railway company shall, if it desires to construct so much of said pavement itself as it is required by this ordinance to construct to so notify the city clerk in

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writing before the contract for the construction of such pavement is awarded, and it shall thereupon be the duty of said railway company upon making such election to execute its part of said paving in conjunction with the progress of same work under the direction of the city. In the event of said railway company failing to give said notice or failing to proceed with the work if such notice is given, the said work shall be executed by the city and be charged to the said railway company and the measure of the liability of said railway company shall be the cost and expense of construction of that portion of the paving hereby made the duty of said company to construct. It shall be the duty of the grantee, at its own expense to lower, relay and reconstruct all water and gas mains sewer manholes and all pipes, wires and cable laid in any street when such lowering, relaying or reconstruction is made necessary by the grading of any street in the construction, operation or maintenance of said railway.

SEC. 5. The Mayor and councilmen of said city shall not be deemed by the granting of the privilege contained in this ordinance to have waived or abandoned the right to make all needful and reasonable police regulations with reference to the operation or maintenance of said railway system, and shall at all times have the power to pass ordinances regulating the use of headlights, gongs, and make all other needful rules and regulations for the protection of the inhabitants of said city in connection with the operation of said railway. Fire engines or other fire fighting apparatus of the city of Olathe shall at all times, when answering an alarm of fire have the right of way over, across and along the tracks of said railway and the cars of such railway company shall be stopped after the sounding of the fire alarm and on the approach of a fire engine, hose cart or other fire apparatus, which stopping shall be made when such apparatus is within a distance of 300 feet of such cars and shall remain standing until the same have passed. All cars shall be equipped with gongs or whistles, which shall be sounded for a warning upon the approach to a street crossing, and whenever necessary to warn any person of danger.

All motor cars shall be provided with headlights when run after night. The grantee shall operate its cars at a speed not greater than ten miles an hour in the business portion of the city, and at a speed not exceeding fifteen miles per hour in the residence portion thereof, and all passenger cars or trains shall stop at or near all street intersections, but not on the same, for the purpose of taking on or letting off passengers and at such other places as the Mayor and Council may from time to time designate. The said grantee shall erect, keep and maintain at its own expense suitable proper electric or natural gas lights at the street intersections along the line of its road within the City of Olathe and at such other points within said City as may be necessary to keep its tracks lighted during the hours of the night when its cars are being operated. The entire system of tracks, trolleys, wires and equipment of said railway shall be modern, first class and suitable for the purpose for which it is intended and shall be kept and maintained during the

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existence of this franchise. The location of the tracks, turn outs, Y's, passing tracks and power house and all poles and wires shall be subject to the approval of the City Council. All wires suspended from trolley poles shall not be less than eighteen feet above the surface of the street and all the work and improvements of the said railway company within said city shall be constructed under the supervision of the Mayor and City Council or the city engineer acting under their instructions, so as to afford the least interference both in construction and maintenance with the free and unrestricted use of the streets by the public, consistent with the construction and maintenance of said railway, and the city engineer shall furnish all necessary grades, maps, profiles and other information
13 necessary to enable the said railway company to conform to established grade lines and other established profiles of streets, street crossings or gutters, provided, however, that the said railway company shall pay the said city for all services performed by said engineer in connection with the construction of said railway system. Before doing any work or construction in said City of Olathe the grantee shall file with the city clerk plans and specifications of said work to be approved by the City Council.

SEC. 6. The grantee shall construct and maintain its own bridge or viaduct across Mill Creek in such manner as to not interfere with the unobstructed use by the public of the wagon bridge across said creek.

SEC. 7. The charge for transporting passengers to be exacted by said railway company shall not exceed the sum of 5 cents for one continuous passage of said company's lines from points within the city limits to any other point in such city. Tickets for the use of school children shall be furnished good for one continuous passage, in quantities not less than twenty-five rides, at the rate of two and one half cents each, good during school months. United States mail carriers, policemen and members of the fire department, when uniformed shall be carried free within the city limits. Children under seven years of age when accompanied by any person paying full fare, shall be carried free within the city limits.

SEC. 8. The City of Olathe or any corporation or person duly authorized by it shall have the right to construct, repair or replace water, gas or sewer mains and laterals gas and water service pipes, conduits, to lay wires and cables or any other service utility over or under the tracks of the grantee.

SEC. 9. The grantee shall within thirty days after the passage of this ordinance file its acceptance of the same in the form of a resolution of its board of directors, attested by the corporate seal and before entering upon any of the work hereby authorized the said grantee shall execute to the City of Olathe, Kansas, a bond with good and sufficient sureties to be approved by the City Council, conditioned that the said grantee in the construction or repair of said road will fill all openings and excavations made by it, and will replace or repair all paving, sidewalk, curbing, streets, which may be
14 disturbed by them in the construction of any work under the ordinance, and that they will pay all damages to persons or

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property for which the city may in any way become liable resulting from or growing out of any negligence or want of care on the part of the said grantee in the construction or operation of its road or cars and will pay the city the cost of any construction, repair or other thing which is required of the grantee by the terms of this ordinance and in the performance of which the said grantee shall fail.

SEC. 10. The rights and privileges granted by this ordinance shall be enjoyed and possessed by said grantee, its successors or assigns for the period of twenty years from and after the publication of this ordinance.

SEC. 11. Whenever the City Council shall deem the sureties on the bond provided for in section nine of this ordinance to be inadequate or insufficient, it may require the grantee to give a new undertaking of like tenor and effect to be approved by the city council, Before any successor or assignee of the grantee shall acquire any rights under this ordinance the bond required by section nine of this ordinance shall be given or renewed by such successor or assignee.

SEC. 12. This ordinance shall not be construed as granting to said grantee any exclusive right of privilege or as preventing the granting of a similar privilege to any other person, company or corporation, which may include the right of crossing the tracks of any subsequent grantee.

SEC. 13. All the privileges granted by this ordinance to said grantee shall be held to inure to the benefit of their successors or assigns and said successors and assigns shall be subject to all the conditions, forfeitures, prohibitions and requirements imposed by this ordinance upon the original grantee.

SEC. 14. If the said grantee shall fail to construct, operate and maintain the railway provided for in this ordinance within six months from the date of its publication, and if it shall fail, neglect or refuse at any time during the life of this franchise to do and perform all the matters and things required of it by this ordinance, or shall at any time do any of the things prohibited by the terms of this ordinance, then all the privileges herein granted shall terminate and this ordinance may be repealed by the Mayor and Council, and the grantee, its successors and assigns ousted of all right and privilege hereunder. But it is expressly provided that if the work of construction or the operation of said road be delayed by bona fide strikes, injunctions or legal proceedings, such delay shall not work a forfeiture or be deducted from the time above specified for the completion of said road.

SEC. 15. No assignment and transfer of the right and privileges granted by this ordinance shall be valid unless made in writing, and filed with the city clerk of the city of Olathe, Kansas, together with the written acceptance thereof in due form by the assignee, and thereupon all the rights and privileges granted by this ordinance shall rest in such assignee, provided the same shall not already be forfeited, and the said assignee shall at once be charged with all duties, liabilities and obligations imposed by this ordinance upon the original grantee.

SEC. 16. This ordinance shall take effect and be in force from and after its passage, approval and publication in the official paper of the City of Olathe.

16 Resolved that the Missouri and Kansas Interurban Railway Company accept the franchise heretofore granted to the Company by the Mayor and Councilmen of the City of Olathe, Kansas, on the 20th day of May, 1906, and that the president and other officers of the company be and they hereby are authorized and directed to execute and file with the city clerk of Olathe a written acceptance of said franchise in the name and on behalf of the Company.

I, A. W. McLaughlin, secretary of the Missouri & Kansas Interurban Railway Company, do hereby certify that the foregoing is a true and accurate transcript of a resolution duly passed at a meeting of the Board of Directors of said company, held at its office, 111 West 11th Street, Kansas City, Missouri, on the 2nd day of June, 1906, said transcript being taken from the minutes of the proceedings of that meeting; and that Albert F. Hunt, Jr., is the duly elected president and W. A. McLaughlin is the duly elected secretary of said company.

In witness whereof I have hereunto affixed my official signature and the seal of the company in the city of Kansas City, Missouri, this 2nd day of June, 1906.

[SEAL.] W. A. McLAUGHLIN, *Secretary.*

Please take notice:—

The undersigned pursuant to a resolution of its board of directors passed on the 2nd day of June, 1906, hereby accepts the franchise passed by the Mayor and councilmen of the City of Olathe, Kansas, on the 20th day of May, 1906, and files this written acceptance of same in testimony thereof.

Dated, Kansas City, Missouri, June 2nd, 1906.

THE MISSOURI AND KANSAS INTERURBAN RAILWAY COMPANY.
By A. F. HUNT, JR., *President.*

17 OFFICE OF CITY CLERK, *June 18th,* 1906.

A. F. Hunt, Jr., Pres. of the Mo. & Kas. Inter. Ry. Co., Kansas City Mo.:

You are hereby notified that the City Council of Olathe, Kansas by resolution duly passed, have determined to pave and curb Loula Street in said city from the east line of Kansas Avenue to the Frisco R. R. right of way with cement curb and vitrified brick and to that end have advertised for bids to be received at the office of the City Clerk of said City up to 5 o'clock P. M. June 25th, '06 for the paving and curbing thereof. And therefore this notice is given to you as required under the franchise granted by said City to your Company and that under the terms of said franchise you must notify the City Clerk in writing on or before the time set for bids

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whether you desire to pave that part of said street for which you are liable to-wit: Eight feet, yourself, or whether you desire the successful bidder to pave the same and to be paid for by the Company at the price per square yard for which remainder of said street is let. Unless you notify said City Clerk otherwise, the City will proceed to change the grade and pave the street. Plans and specifications for the paving thereof are now in file in the office of the City Clerk.

Respectfully yours,

(Sgd.) HARRY ILES, *City Clerk.*

18 *Ordinance No. 933.*

An Ordinance Repealing an Ordinance Granting to the Missouri and Kansas Interurban Railway Company the right to operate and maintain an Interurban Railway to be operated by electricity or other motive power except steam over and along certain streets in the City of Olathe, Kansas, passed May 21, 1906.

Be it ordained by the Mayor and Councilmen of the City of Olathe, Kansas:

SECTION 1. That an Ordinance entitled "An Ordinance granting to the Missouri & Kansas Interurban Railway Company the right to operate and maintain an Interurban Railway to be operated by electricity or other motive power except steam" over and along certain streets in the City of Olathe, Kansas, passed May 21, 1906, be and the same is hereby repealed and all rights thereunder granted forfeited and cancelled.

SECTION 2. This ordinance shall take effect and be in force from and after its passage, approval and publication in the official paper of the city.

Passed and approved this 25th day of June, 1906.

Attest: F. R. OGG, *Mayor.*

[SEAL.] HARRY ILES, *Clerk.*

19 UNITED STATES OF AMERICA:

STATE OF KANSAS,
Tenth Judicial District, Johnson County, ss:

The State of Kansas to the Sheriff of Johnson County, in said State, Greeting:

You are hereby commanded to notify the City of Olathe, Defendant, that it has been sued by The Missouri and Kansas Interurban Railway Company Plaintiff, in the District Court of the Tenth Judicial District of the State of Kansas, sitting within and for the County of Johnson, and that it must answer the petition filed by the said Plaintiff The Missouri and Kansas Interurban Railway Company against it in the Clerk's office of the District Court aforesaid, by the 16 day of September A. D. 1907, or the said petition will be taken as true, and judgment rendered accordingly.

POOR

You will make due return of this summons on or before the 26th day of September A. D. 1907.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court in my office in the City of Olathe, in said County and State, this 16th day of September, A. D. 1907.

[SEAL.]

GEO. W. FOLMER, *Clerk.*

SHERIFF'S OFFICE, OLATHE, KANS.

I received this summons on the 16th day of August A. D. 1907 at 4 o'clock P. M. of that day, and I served the same on the within named City of Olathe in my county by delivering a true copy hereof with all endorsements hereon duly certified to John J. Glover, Maoyor of said city, personally on the 16 day of Aug. A. D. 1907.

J. S. STEEL,
Sheriff Johnson County, Kansas,
By J. D. WOODWORTH,
Under Sheriff.

Fees.

Service	$.50
Mileage	
Total	$.50

(Endorsed:) Appearance Docket. No. 6920. District Court, Johnson County. Summons. Issued Aug. 16, 1907. Returnable Aug. 26, 1907. Mo. & Kan. Int. Ry. Co. vs. The City of Olathe. Frank Doster; Ogg & Scott attorneys for Plaintiff. Filed Aug. 17, 1907. Geo. W. Folmer Clerk of Court.

Attest:
GEORGE W. FOLMER, *Clerk.*

20 In the District Court, Johnson County, Kansas.

THE MISSOURI & KANSAS INTERURBAN RAILWAY CO., a Corporation,
Plaintiff,
vs.
THE CITY OF OLATHE, Defendant.

Demurrer.

Now comes the said defendant, The City of Olathe and demurs to the amended petition of the plaintiff, for the reason that said amended petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant.

C. L. RANDALL,
City Attorney.
J. W. PARKER AND
J. P. HINDMAN,
Of Counsel.

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(Endorsed:) 6920. Mo. & Kans. I. Ry. Co. vs. City of Olathe. Demurrer. Filed Oct. 26, 1907. Geo. W. Folmer, Clerk of Court.

21 Sixteenth Day, September Term, October 28th, 1907.

No. 6920.

THE MISSOURI & KANSAS INTERURBAN RAILWAY COMPANY
vs.
THE CITY OF OLATHE.

Damages.

Journal Entry.

Now on this 28th day of October, 1907, at the Spetember term, 1907, this cause came on for hearing on the demurrer of the Defendant to the amended petition of the Plaintiff herein filed.

The plaintiff appeared by its attorney of record Ogg and Scott, and the defendant appeared by its attorney of record C. L. Randall, and the Court having heard the said demurrer, arguments of counsel and being well advised in the premises the court doth sustain the said demurrer, to which ruling, the plaintiff at the time duly excepted and excepts.

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22 STATE OF KANSAS,
County of Johnson, ss:

I, Geo. W. Folmer, Clerk of the District Court for said County do hereby certify that the foregoing is a full, true and correct transcript of the record in the above entitled cause.

In testimony, whereof, I have hereunto set my hand and seal this 16th day of October, 1908.

GEO. W. FOLMER, *Clerk.*

Filed Oct. 17 1908.
D. A. VALENTINE,
Clerk Supreme Court.

23 Be it remembered that on the 3rd day of November 1909 the same being one of the regular judicial days of the July Term, 1909, of the supreme court of the state of Kansas before said court in session at the supreme court room in the city of Topeka, the following proceeding, among others, was had and entered of record as follows, to-wit:

24 In the Supreme Court of the State of Kansas, Wednesday, November 3, 1909.

No. 16202.

J. A. EDSON, Rec., etc., Pl'ff in Error,
vs.
THE CITY OF OLATHE, Def't in Error.

This cause comes on to be heard on the petition in error and the transcript of the record of the district court of Johnson county; and thereupon after oral argument by S. F. Seaton for the plaintiff in error and by C. L. Randall for the defendant in error, said cause is submitted on brief of counsel for both parties and taken under advisement by the court.

25 Be it remembered that on the 11th day of December, 1909, the same being one of the regular judicial days of the July Term, 1909, of the supreme court of the state of Kansas before said court in session at the supreme court room in the city of Topeka, the following proceeding, among others, was had and entered of record as follows, to-wit:

26 In the Supreme Court of the State of Kansas, Sat., Dec. 11, 1911.

No. 16202.

J. A. EDSON, Rec., etc., Appellant,
vs.
THE CITY OF OLATHE, Appellee.

This cause comes on for decision; and thereupon it is ordered and adjudged that the judgment of the court below be affirmed. It is further ordered that the appellant pay the costs of this case in this court taxed at $— and hereof let execution issue.

27 Be it remembered, that on the 11th day of December 1909, there was filed in the office of the clerk of the supreme court of the state of Kansas, a syllabus and opinion of the court which with the indorsements thereon is in the words and figures as follows, to wit:

28 No. 16202.

J. A. EDSON, as Receiver, etc., Appellant,
v.
THE CITY OF OLATHE, Appellee.

Syllabus by the Court.

Damages—Liability of a City—Repeal of Franchise Ordinance. A city is not liable in damages for the repeal of a street-railway-

franchise ordinance which does not engage the city in any private proprietary capacity, nor for the conduct of its officers in publishing and subsequently enforcing the repealing ordinance.

Appeal from Johnson district court; Winfield H. Sheldon, judge. Opinion filed December 11, 1909. Affirmed.

A. F. Hunt, jr., F. R. Ogg, S. D. Scott, and S. T. Seaton, for the appellant.

C. L. Randall, city attorney, for the appellee.

The opinion of the court was delivered by

BURCH, *J.*:

The railway company sued the city for damages following the repeal of an ordinance granting the use of the streets of the city for the construction and operation of a street and interurban railway. A demurrer was sustained to the petition, and the railway company, by its receiver, appeals.

After alleging the passage of the original ordinance, acceptance of its terms, and compliance with its conditions on the part of the plaintiff, the petition proceeds as follows:

"The plaintiff further avers that notwithstanding its rights in the premises the said defendant refused to permit said plaintiff to enter said city for the purpose of constructing and operating its line of railway as provided for in said ordinance, and to enjoy the franchise, rights and privileges by said ordinance conferred, and therein did on the 25th day of June, 1906, enact, a certain ordinance repealing the ordinance hereinbefore mentioned of May 21, 1906, and
29 from thence on did refuse to allow the said plaintiff the enjoyment of its aforesaid franchise, and contract rights and privileges, and did refuse to approve plaintiff's bonds, plans and specifications and repudiated said contract, a copy of which ordinance of repeal is hereto attached and made a part hereof. Which said repealing ordinance was duly published in the Olathe Republican-Tribune, the official paper of said city."

The franchise ordinance designated the streets to be used, covered fully the subjects of construction, maintenance and operation, and prescribed many regulations intended to conserve the right of the general public to use the streets and in other respects to protect and promote the public welfare. It required that connection be made with the street railway system of Kansas City, Mo. Some of the proprietary rights of the city which would necessarily be affected by the exercise of the privileges granted were protected, but no independent, private, proprietary corporate object or advantage was sought to be obtained by means of the franchise, and the city assumed no obligation of a private proprietary nature. A right of repeal under certain circumstances was reserved, the railway company was required to give bond for the performance of conditions imposed and was required to file with the city clerk plans and specifications of construction work, to be approved by the city council before construction commenced.

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The damages claimed were cost of condemnation proceedings, attorney fees, loss of profits, depreciation in the market value of bonds at the time on sale, and some other items.

Evidently the petition was prepared on the theory that the repeal of the franchise ordinance, and the consequent damage, created a cause of action against the city. The general statement that the city refused to permit the plaintiff to enter the city is limited by the specification as to how the refusal was accomplished—"and therein did on the 25th day of June, 1906, enact a certain ordinance
30 repealing," etc., and the repealing ordinance was of course the act of obstruction and repudiation actually relied on. In the principal brief the cause is argued as if the repeal of the franchise ordinance occasioned the damage and furnished the foundation of the action. An attempt is made to fortify the argument in a reply brief, but in an addendum to the reply brief the position is abandoned altogether. The plaintiff now relies on the so-called ministerial act of publishing the repealing ordinance, the subsequent refusal of the city to approve its bonds, plans and specifications, the subsequent refusal to allow the plaintiff to enjoy its franchise, and the subsequent repudiation of the contract. These points will be noticed as if the theory of the petition really embraced them.

The statute requires all ordinances of cities of the second class, except those for the mere appropriation of money, to be published before they become effective. Enactment and publication combine to make the law. They constitute separate stages of the process whereby municipal law comes into being, and whenever city officials act in a public, political, governmental capacity for the passage of an ordinance they act in the same capacity for the publication of it. City ordinances relating to matters of general public concern have the force and effect of law. (Yount v. Denning, 52 Kan. 629, 636.) The city is the delegated agent of the sovereignty to establish the law in the municipal territory, and the agency lasts until the end is attained. This is not a case involving simply the ministerial execution of work laid out by an ordinance after legislative discretion has ended. (The City of Leavenworth v. Casey, McCahon, 124, 1 Kan. [Dassler's ed.] 544, 550; Bowden v. Kansas City, 69 Kan. 587, 590.) While legislative discretion over the contents of the ordinance may have ended with the proceedings in the council chamber, the governmental function of promulgating public law did not end until the ordinance was published in due form. Therefore
31 the city is under no more liability for the conduct of its officers in publishing an ordinance, whereby it acquires the quality of law, than it is for the conduct of the same officers in considering the ordinance section by section or in voting upon it.

Concerning the other matters supposed to entail liability—refusal to approve bonds, etc., after the repeal, re-repudiation of the franchise and re-refusal to permit it to be enjoyed—the question is, In what capacity was the city acting? If it acted as an agent of the sovereignty upon a subject of general public concern, dissociated from any private, proprietary corporate right, it shares the sovereign's immunity from suit.

In granting the franchise the city acted in a purely governmental capacity. It sought to promote the general welfare, and nothing else. It had no private, proprietary end in view, obtained no advantages of that character, and assumed no obligations of that kind. The repealing ordinance dealt with the same subject—the general welfare—and nothing else. The subsequent measures taken by the city pursuant to the repealing ordinance and by way of its enforcement belong to the same category. They were purely governmental measures, taken by the city as the agent of the state for the promotion of the public good, and had no private corporate aspect whatever. What the city officials did was to prevent the streets from being invaded and permanently occupied by the plaintiff with its ties and rails and wires and poles and moving cars, to the detriment of the traveling public. It may be that the repealing ordinance was void. It may be that the conduct of the city confirmatory of the repeal was all wrong, oppressive and injurious to the plaintiff. But since the mayor and council and other officials, if any, acted not for the peculiar private advantage of the corporation but as representatives of the state in a matter of general public interest, the city is no more liable in damages for what they did than the state itself.

"Acts done by the mayor and aldermen, or the mayor
32 alone, to keep the streets clear of obstructions, are acts done by them as public officers, and not as agents of the city, and for such acts the city was not liable to be sued." (Haskell v. New Bedford, 108 Mass. 208, 211.)

The distinction between the governmental and proprietary functions of municipal corporations and their officers has been stated and acted upon so many times that authorities are superfluous. Some of the numerous Kansas cases are the following: The State, ex rel., v. Hunter, 38 Kan. 578; Peters v. City of Lindsborg, 40 Kan. 654; La Clef v. City of Concordia, 41 Kan. 323; City of Caldwell v. Prunelle, 57 Kan. 511; The State v. Water Co., 61 Kan. 547; Freeman v. Chanute, 63 Kan. 573; Water Co. v. Cherryvale, 65 Kan. 219; Asher v. Water Co., 66 Kan. 496; Bowden v. Kansas City, 69 Kan. 587.

The following statement appears in the plaintiff's brief:

"That in granting granchises, authorizing water, gas, telephone, railroad and other companies to set poles, lay pipes and tracks, and otherwise use and occupy its streets, municipal corporations exercise, not legislative or governmental powers, but quasi-private power conferred by law, and in such matters are governed by the same rules that apply to an individual or a private corporation, is settled law in this state. The State v. Water Co., 61 Kan. 547, 561. Water Co. v. Cherryvale, 65 Kan. 219, 228."

The cases cited do not so hold, and such is not the law. In the case of The State v. Water Co., 61 Kan. 547, the city of Topeka rented from the water company to which a franchise was granted 150 hydrants and agreed to pay rent for them in the sum of $700 per year. The water company further agreed to establish any additional hydrants the city required, for which the city agreed to pay $50 per year each. It was further provided that the company would

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erect ten hydrants on each mile of extensions of pipe, for which the city should pay $500 per annum. After the number of
33 hydrants reached 300 the city was to have water for additional fire hydrants free on paying the cost of the hydrants and connections. In view of the purely proprietary features of the ordinance the court said:

"In the making of said contracts evidenced by ordinances the city was not exercising legislative or governmental powers, but quasi-private power conferred by law, and in such matters it could exercise its business affairs governed by the same rules as apply to an individual or a private corporation." (Page 561.)

In the case of Water Co. v. Cherryvale, 65 Kan. 219, the city, besides granting the water company a franchise, rented forty-five hydrants at an annual rental of $2700 and reserved the right to buy the plant at the expiration of a stated term. The litigation arose out of the business features of the ordinance, and the court said: "In the making of such a contract the city exercised quasi-private power and was governed by the rules applicable to an individual or a private corporation." (Page 228.)

Cases from other jurisdictions are cited with the same lack of discrimination to sustain the proposition advanced in the brief and they need not be reviewed at length. The case of State ex rel. v. Gates, 190 Mo. 540, is perhaps an exception, and being exceptional is not controlling. Likewise, in the cases cited to show pecuniary liability on the part of cities for breaches of franchise ordinances, business affairs and not governmental conduct furnished the ground of action. A city may grant water, gas, electric-light, telephone and street-railway franchises and utilize none but its governmental powers, as the city of Olathe did in this case; and so long as city officials confine themselves to the exercise of such powers and do not involve the corporation on its proprietary side it will not be held responsible in damages for misuser.

The plaintiff says the enforcement of the repealing ordinance deprives it of property without due process of law and con-
34 consequently the remedy lies in an action for damages. The premise may be granted without stopping to analyze it, for the conclusion does not follow. The mayor and council were not acting as private corporate agents, but as public officials clothed with delegated sovereign authority, and the remedy was to institute appropriate proceedings to restrain them from executing the repealing ordinance, and so from interfering with the plaintiff's enjoyment of its franchise.

The plaintiff seeks to evade the principle involved by giving a name to the violated obligation. It is said the duty not to deprive the plaintiff of its franchise was an "imposed" duty, just as the publishing of the repealing ordinance was called a "ministerial" act. The duty not to impair the obligation of the contract resulting from the acceptance of the franchise by repealing the franchise ordinance might as well be called an "imposed" duty, but the plaintiff has conceded that reparation for its breach does not lie in damages. The reason for non liability is the same in both cases.

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Imposed duties for the neglect of which the city may be liable are those which are superadded to merely governmental functions, like the special, private corporate duty to maintain streets in a safe condition for public travel (Gould v. City of Topeka, 32 Kan. 485), or the special, private corporate duty to maintain and manage corporate property so that city employees shall have safe places in which to work (Bowden v. Kansas City, 69 Kan. 587). The constitutional mandates invoked came to the city officials merely as rules to be observed in the performance of their governmental duties, and not as special increments to the private corporate duties of the municipality.

In the reply brief the argument is advanced for the first time that on the face of the petition there is no legitimate excuse for the conduct of the city, and hence the mayor and council acted arbitrarily and in bad faith and so rendered the city liable in
35 damages. Here again the theory of the petition is abandoned, but the interpretation proposed may be conceded without question, for the conclusion does not follow. If the city officials acted in bad faith the city might be enjoined (Paola v. Wentz, 79 Kan. 148), but it is quite elementary that such officials could not, by departing from official probity and duty in the field of governmental activity, convert themselves into private corporate agents with capacity to bind the corporation in pecuniary damages.

The judgment of the district court is affirmed.

36 Be it further remembered, that afterwards, to-wit on the 31st day of December, A. D. 1909, there was filed in the office of the clerk of the supreme court of the state of Kansas, a petition for a rehearing, which, with the indorsements thereon are in words and figures as follows, to-wit:

37 Filed Jan. 10, 1910. D. A. Valentine, Clerk, Supreme Court.

16202. 93793.

In the Supreme Court of the State of Kansas.

No. 16202.

J. A. Edson, Receiver of The Missouri & Kansas Interurban Railway Company, a Corporation, Plaintiff in Error,

vs.

The City of Olathe, Defendant in Error.

Petition for Rehearing.

Bowersock & Hall, A. F. Hunt, Jr., S. D. Scott, S. T. Seaton, Attorneys for Plaintiff in Error.

38 In the Supreme Court of the State of Kansas.

No. 16202.

J. A. EDSON, Receiver of The Missouri & Kansas Interurban Railway Company, a Corporation, Plaintiff in Error,
vs.
THE CITY OF OLATHE, Defendant in Error.

Petition for Rehearing.

Now comes the plaintiff in error, J. A. Edson, Receiver of the Missouri & Kansas Interurban Railway Company, and files herein his petition for rehearing and reargument of this cause in this Court for the reason and upon the grounds following, to-wit:

First.

That the decision of the Court, handed down on the 11th day of December, 1909, is erroneous because under it the City of
39 Olathe is enabled to impair the obligation of a contract and deprive a person of his property without due process of law, provided only that in so doing the municipality acts in a governmental as distinguished from a proprietary capacity.

There can be no question but that the franchise granted to the plaintiff constituted a contract between the City and the plaintiff, whether the City in granting it acted in a governmental or a proprietary capacity, irrespective of whether the City secured any direct benefit or corporate advantage thereunder. This is the universal holding of all courts. There can also be no question but that the acts of the City complained of in the petition deprived the plaintiff of all benefits accruing to it under the terms of that contract. The repealing ordinance following by the publication thereof, by the refusal of the City officials to approve plaintiff's bonds, plans and specifications and by its refusal to allow plaintiff the enjoyment of said contract, all of which were alleged in the petition, completely prevented plaintiff from deriving any advantage from the franchise and in effect confiscated its contract. There can, further, be no question but that the rights of said plaintiff under said contract were property and that plaintiff received no compensation for the taking of them. The plaintiff was, therefore, clearly deprived of its property without due process of law, within the fourteenth amendment to the Constitution of the United States. The Court in its opinion admits this, its language being as follows:

"The plaintiff says the enforcement of the repealing ordinance deprives it of property without due process of law and consequently the remedy lies in an action for damages. The promise may be granted, without stopping to analyze it, for the conclusion does not follow."

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40 The holding of the Court, however, is that if, in such taking of a plaintiff's property, the City and its officers act as public officials, clothed with delegated sovereign authority and not as private corporate agents, then said plaintiff's remedy, if any, is injunctive and not compensatory. In other words, that while said plaintiff might perhaps prevent the injury, he cannot recoup his damages if the City and its officers act too speedily for him to be able to prevent. This doctrine is not only novel and unsupported by authority, but is absolutely subversive of the Federal Constitution in many instances.

It results from the decision that if a City by ordinance authorizes the cutting down of trees in front of certain lots, and the city officials proceed to carry out said ordinance, the owner of the lots, perhaps may restrain such damage if he learns of its intended infliction (as was held in the case of Paola vs. Wentz, 81 Kansas 148), but is without remedy in case the city once gets the trees cut down, however wrongfully. It results from the decision that a city may by ordinance repeal the franchise of a public service corporation and order its tracks or pipes or wires to be removed from the streets, and may actually tear up such tracks or pipes and tear down such wires without liability for so doing, and that the corporation is remediless, unless it watches its property day and night with a blank restraining order, ready for service at any moment.

We cannot believe that the Court intended to lay down any such doctrine, but we submit that such is the logical and unavoidable result of holding that a city is not liable for the repealing of a street railway franchise ordinance, which does not engage the city in any private proprietary capacity, or for the conduct of its officers in publishing and subsequently enforcing the repealing ordinance.

Second.

41 That said decision is erroneous because based upon a misconception of the distinction between governmental and proprietary functions.

The error into which the Court has fallen in this decision is due, we believe, in part, to a misconception of the cases turning upon the distinction between the governmental and proprietary functions of municipal corporations. It is doubtless true, as a general rule, that a city is liable for its actions and the actions of its agents in matters involving the city in what the Court calls its private proprietary capacity, and not in matters involving the city in its purely governmental capacity. This rule, however, applies to the liability of *its* city to the public in general, and does not apply to any case in which the city is under a duty or obligation to an individual citizen. It is not by any means universal in its application. It does not apply to contract relations; for instance, to the obligation of the city to pay the salaries of its officers, even though these officers are engaged in purely governmental functions. The liability of a city to suit by such officers for unpaid salary would seem to be beyond question.

Nor does it apply to any case involving the taking of property without due process of law, or the impairment of the obligation of a contract. The cases are absolutely clear that, if property is taken, the question whether the city acts in a governmental or a proprietary capacity has nothing whatever to do with the question as to whether there has been "due process of law."

It is expressly stated in the case of Walla Walla vs. Water Works Company, 172 U. S. 1, that the United States Courts do not make the question as to whether or not a party is entitled to the protection of the fourteenth amendment depend upon whether or not the city acts in its sovereign or in its proprietary capacity, but that in either case the action of the city is state action, and the city is amenable
42 to the jurisdiction of the Federal Court. Indeed, the only doubt expressed in that case is not whether the constitutional amendment covers governmental acts by the city, but whether the amendment covers proprietary acts, it being assumed as a matter of course that the amendment covers governmental acts.

As a matter of fact the fourteenth amendment was particularly directed toward governmental acts, as its form indicates. The state itself, in spite of its sovereignty and immunity from suit, and every agent and instrumentality of the state, including municipal corporations, are within the prohibition of the fourteenth amendment. See C. B. *N* Q. Ry. Co. vs. Chicago, 166 U. S. 226, in which the court says, "This must be so, or the Constitution has no meaning and the State has clothed one of its agents with power to annul or evade it."

It seems never to have been doubted that a grant of a franchise, its acceptance and the expenditure of money in the pursuance of it, creates a contractual relation between the municipal corporation and the grantees, for a violation or an attempted violation of which the municipal corporation, no matter in what capacity it acts, is amenable to the jurisdiction of the courts.

Cleveland vs. Railway, 194 U. S. 517;
N. W. Tel. Co. vs. Minneapolis, 84 Minn. 140;
City of Ashland vs. Wheeler, 88 Wis. 607;
Des Moines Street Ry. vs. Des Moines, 5 St. Ry. Reps. p. 281 and cases cited in notes.

Third.

That the decision is erroneous because it holds that if the city acted as an agent of the sovereign state upon a subject of
43 general public concern dissociated from any private proprietary corporate right, it shares the sovereign's immunity from suit.

The first objection to this holding is that the privilege of the sovereign which protects it against suit, being of a personal nature, may be waived and, therefore, even if such privilege exists in favor of the City in the acts alleged to have been done by it, the City has not claimed such privilege and cannot claim it under the pleadings presented in this case. No such ground of demurrer is anywhere suggested in the record.

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In addition to this the privilege of immunity is waived so far as municipal corporations are concerned by the express statutory provision, declaring that municipal corporations may both sue and be sued. No limitation is placed by the statute upon this waiver. Innumerable suits, both at law and in equity, have been brought under its terms both by and against cities, and we are unable to see upon what principle the doctrine of sovereignty should be allowed to permit an action in equity against the city and to prohibit an action at law. It seems clear that the City can be sued in this State in any appropriate form of action for any breach of a legal duty imposed upon said City.

It is true that even under this statute a municipal corporation enjoys a certain immunity from suit, but this differs distinctly in kind from the immunity enjoyed by a state. The former, when it exists at all, is due to the discretionary nature of the act causing the damage.

An instructive instance of this difference is shown by a comparison of the following cases:

In the case of Langford vs. United States, 101 U. S. 341, it is held
44 that the maxim of English constitutional law that "the King can do no wrong" has no application to the government of this country; that even the sovereign government of the United States may be guilty of a tort; but by reason of its immunity from suit no recovery can be had therefor.

The immunity of the city, however, when it has any, does not rest upon the basis of sovereignty, but upon the ground that its action, when discretionary and within its proper limits, is not subject to the control of the courts.

The case of Davis vs. Mayor, 1 Duer 451, 497, contains the following statement of this principle:

"Notwithstanding these observations, the question still remains, has this court, or any court of equity, the power to interfere with the legislative power of the common council of this city, or of any other corporation? And to this question I at once reply, certainly not, if the term 'discretion' be properly limited and understood; and, thus understood, I carry the propsition much further than the counsel who advance it. This court has no right to interfere with and control the exercise, not merely of the legislative, but of any other discretionary power, that the law has vested in the corporation of the city, and hence I deem it quite immaterial whether the resolution in favor of Jacob Sharp and his associates be termed a 'by-law,' 'a grant,' or 'contract,' or whether the power exercised in passing it be termed 'legislative,' 'judicial,' or 'executive;' for if the corporation had the power of granting all the extraordinary privileges which the resolution confers, the propriety of exercising the power, and perhaps even the form of its exercise, rested entirely in its discretion. A court of equity has no right to interfere with and control in any case the exercise of a discretionary power, no matter in whom it may be vested,—a corporate body, or individuals, the alderman of a city, the directors of a bank, a trustee, executors, or guardian; and I add that the meaning and principle of the rule, and the limitations to which it is subject, are, in all the cases to which

it applies, exactly the same. The meaning and principle of the rule are that the court will not substitute its own judgment for
45 that of the party in whom the discretion is vested, and thus assume to itself a power which the law had given to another; and the limitations to which it is subject are that the discretion must be exercised within its proper limits, for the purposes for which it was given, and from the motives by which alone, those who gave the discretion intended that its exercise should be governed."

This statement of the law is approved by the Supreme Court of California in the case of Spring Valley Water Works vs. San Francisco, 22 Pac. Rep. 915. These cases make it quite clear that the rule of non-interference with the legislative discretion of municipal corporations of which there is such a parade in the reported cases, finds no basis in any supposed exemption from liability on account of sovereignty, nor is any such extension of the doctrine of sovereignty to support the decision in any of these cases.

We can find no authority whatever for the proposition that a city is immune from suit when it does any unconstitutional act which results directly in depriving the citizen of his property without due process of law, whether the act complained of is governmental or proprietary.

A further objection to the decision of the Court in this case upon the question of immunity is that it proves too much. The immunity of the State applies as well to proprietary as to governmental matters, and to equitable as well as legal remedies. The Court states that the City would be liable in damages if its act were proprietary, and that it might be enjoined from executing its ordinances, even though they involved purely governmental affairs. It follows from this that the City does not share the State's immunity, but such exemption from suit as it does possess is due to its having discretionary power and exercising that power within the limits prescribed by law.

46 Fourth.

That the decision of the Court is erroneous in so far as it holds *ht*at the mandates of the fourteenth amendment came to the City officials merely as a rule to be observed in the performance of their governmental duties, so that the violation of said mandates entails no liability upon the city.

We have no doubt that these constitutional mandates as said by the Court, are rules to be observed by the City in the performance of its governmental duties. If so, then said rules might be broken in the attempted performance of such duties by the City, and any citizen damaged thereby should have his remedy. We know of no rule of law or decision holding that such remedy is limited to equity, and that if the damage is completed the remedy is gone. While a remedy in equity is sometimes denied because the suitor has an adequate remedy at law, there is, we think, no authority for the converse of this proposition, that a suitor is denied his legal remedy because he may have an adequate remedy in equity.

Chicago vs. Taylor, 125 U. S. 161.

King vs. City of Kansas City, 58 Kan. 334.

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Fifth.

The Court erred in construing as admissions certain matters conceded by plaintiff in error only for the sake of argument and in stating that plaintiff abandoned in its reply brief *of* position taken in its petition and in its original brief.

The Court in its opinion ascribes to the plaintiff in several instances a change of position from that taken in the petition. This is clearly a misapprehension on the part of the Court of plaintiff's intention. The plaintiff has intended to take and maintain the same position at all times; that the repealing ordinance and the acts based thereon as alleged in the petition deprived plaintiff
47 of its property without due process of law. The plaintiff first argues that the passage of the repealing ordinance was improper; second, that even if its passage was proper, its publication was improper; third; that even if the passage and publication were both proper the subsequent acts were improper. But plaintiff does not concede and never has conceded that any one of these acts was proper, or that any one of these acts, standing alone, would not give the plaintiff a cause of action against the City if followed by damage to the plaintiff. It is not necessary, however, for the plaintiff in this case to reply upon the impropriety of any single act. Its position has been consistent throughout that all of the acts done, together constituted an unlawful act on the part of the City — which the plaintiff was entitled to compensation. The Court is wrong in saying that the petition counts on the repeal alone. The petition distinctly alleges and counts upon all of the alleged wrongful acts. The *for which the plaintiff was entitled to compensation. The Court is wrong in saying that the petition counts the the repeal alone. The petition distinctly alleges and ceded that reparation for the breach of the "imposed"* duty on the City by repealing a franchise does not lie in damages. On the contrary, plaintiff now insists, as it has at all times, that if such breach of a duty imposed by the Federal Constitution by repealing the franchise, or otherwise, results in the taking of its property as represented by its franchise, it is entitled to compensation.

Indeed, the Court seems to misapprehend the entire theory of plaintiff's petition. This is not a suit for a breach of a contract, nor is it a suit sounding in tort for damages resulting from some wrongful act on the part of the City, or its officials. The petition alleges facts constituting a taking of plaintiff's property without due
48 process of law, and asks compensation for such taking, in an amount representing the value of such property.

The plaintiff was entitled under its franchise to certain rights of user, which constitute property under its contract with the City. The value of this right at the time it was taken and destroyed by the City is measured by the amount expended by plaintiff upon the strength of the franchise, and in order to utilize its rights thereunder, and further by the tolls and revenue lost by it during the period from the repealing of the old franchise to the granting of the new franchise set out in the petition. In other words, plaintiff was de-

prived by the wrongful acts of the City of its right of user during the time alleged in the petition and is entitled to recover from the City the reasonable value thereof.

It seems clear, however, that the amount of compensation, or the measure of damages, set out in the petition cannot have any bearing upon the question now before the Court, which, arising upon a general demurrer to the petition, involves simply the question whether or not plaintiff is entitled to any damages thereunder. Even if plaintiff has alleged a wrong measure of damages which we do not admit or concede, this fact would not affect the question before the court. And if it be a fact, which we do not concede, that plaintiff is not entitled to consequential damages by reason of the impairment of the value of its securities by defendant's wrongful acts, that matter is not one which could properly be raised by general demurrer to the petition.

Sixth.

That the Court erred in holding that the acts of the defendant City in this case are not a violation of the fourteenth amendment to the constitution of the United States.

49 In conclusion we desire to urge upon the Court the importance of the decision rendered herein not so much because of its effect upon the demand for compensation made by the plaintiff herein, but because of its effect upon the status of every franchise granted by any municipal corporation in this State. As alleged in the petition, this plaintiff now holds a subsequent franchise granted by the City of Olathe, which under this decision the Court has put it in the power of said City to repeal and destroy without fear of any financial responsibility for its wrongful acts. The decision in effect exempts municipal corporations from liability for violations of the mandates of the fourteenth amendment to the Federal Constitution in all cases where such violation cannot be anticipated and prevented. Regardless of the justice or injustice of the decision as applied to the facts in the present case, we submit that the effect of the decision is so far reaching and of such importance to all of the municipalities and public service corporations of the State that the question should be given a more exhaustive investigation than it has been possible for it to receive in the time between the submission of the case and its decision. The plaintiff's brief seem- not to have presented to the Court its theory of the case in as clear cut a manner as it should be submitted in a case of such importance. The Court seems to have misapprehended plaintiff's position, and we respectively ask, therefore, and for the reasons above given, that the Court grant a rehearing and reargument of the case.

BOWERSOCK & HALL,
A. F. HUNT, JR.,
S. D. SCOTT,
S. T. SEATON,
Attorneys for Plaintiff in Error.

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50 Be it remembered that on the 12 day of March 1910, the same being one of the regular judicial days of the January Term, 1910, of the supreme court of the state of Kansas before said court in session at the supreme court room in the city of Topeka, the following proceeding, among others, was had and entered of record as follows, to-wit:

51 No. 16202.

In the Supreme Court of the State of Kansas, Sat., March 12, 1910.

J. A. EDSON, Receiver, Appellant,
vs.
CITY OF OLATHE, Appellee.

Now comes on for decision the petition for a rehearing of this cause; and thereupon it is ordered that said petition be denied.

52 Be it remembered, that on the 12th day of March 1910, there was filed in the office of the clerk of the supreme court of the state of Kansas, a syllabus and opinion denying petition for rehearing which with the indorsements thereon is in the words and figures as follows, to wit:

53 No. 16202.

J. A. EDSON, as Receiver, etc., Appellant,
v.
THE CITY OF OLATHE, Appellee.

No. 16,202.

Syllabus by the Court.

Damages—Liability of a City—Misfeasances of Officers Acting in a Governmental Capacity. — The state does not guarantee the judgment or fidelity of its officers and agents in their conduct of political affairs, and municipal corporations, erected for purposes of local government, are not liable for misfeasances of their officers when acting in a governmental capacity with respect to matters of general public concern. The principle of respondent superior does not apply in such cases.

Appeal from Johnson District Court; Winfield H. Sheldon, Judge.

54 *Opinion Denying a Rehearing. Filed March* 12, 1910.

(For original opinion see Edson v. Olathe, 81 Kan. 328.)

A. F. Hunt, Jr., F. R. Ogg, S. D. Scott, and S. T. Seaton, for the appellant.

C. L. Randall, city attorney, for the appellee.

The opinion of the court was delivered by

BURCH, *J.*:

The original opinion (81 Kan. 328) shows that the cause of action presented by the petition was based on the passage of the repealing ordinance. This position, it was said, was finally abandoned in this court, and error was predicated upon a theory not embraced in the petition. In a petition for a rehearing it is said the plaintiff did not abandon the claim that the passage of the repealing ordinance gave a cause of action. The court accepted and acted upon the declaration of counsel for the plaintiff made in an addendum to the reply brief which reads as follows:

"The plaintiff in this case does not rely on the *passage* of the ordinance as a cause of action, but on the *ministerial act of publication*, and the *subsequent* repudiation of the contract by the city and its *arbitrary* refusal to proceed with the contracts [and] approve its bonds and plans, without which the plaintiff could not lawfully enter upon the streets."

The italics are those of the brief-maker.

Ordinarily the court must decline to give its opinion upon questions which have been withdrawn from its consideration. Since, however, in this instance the only cause of action stated in the petition was for the passage of the repealing ordinance, and the petition for a rehearing indicates a desire for a ruling upon the sufficiency of the petition in its true aspect, the court will state its views.

In passing the repealing ordinance the mayor and council were for the time the legal equivalent of the legislature of the state of Kansas. The repealing ordinance was a public law promul-

55 gated by the sovereign authority of the state. No private proprietary corporate function or interest of the city was involved. The purely local good of the community was a desideration only as it was a part of the general public welfare. The constitution of the United States is a paramount law of the land. The state legisalture and its agent and representative in this matter, the city legislature, were bound to observe that law. From the face of the petition it appears the city did not do this and that, consequently the repealing ordinance was void. If proper application had been made to any court of the state having jurisdiction the ordinance would have been adjudged to be a nullity, and all the

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officers and agents of the city would have been restrained and enjoined from enforcing the ordinance and from disturbing the plaintiff in the enjoyment of its franchise rights. Besides this, any person acting under the warrant of the void ordinance who trespassed upon the plaintiff's rights would, in a proper action, be adjudged to pay the damages he occasioned. But the law of this state affords the plaintiff no other remedies. The state does not guarantee the judgment or fidelity of its governmental officers and agents in their conduct of political affairs, and municipal corporations, erected for purposes of local government, are not liable for misfeasances of their officers when acting in a governmental capacity with respect to matters of general public concern. The principle of *respondeat superior* does not apply in such cases. Therefore the petition fails to state a cause of action.

Other matters presented by the petition for a rehearing require no further notice, and the petition is denied.

56 *Authentication of Record.*

SUPREME COURT, STATE OF KANSAS, *ss:*

I, D. A. Valentine, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of The Missouri and Kansas Interurban Railway Company, Plaintiff, vs. The City of Olathe, defendant, and also of the opinions of the Court rendered therein, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in Topeka, Kansas, this 2" day of May 1911.

[SEAL.] D. A. VALENTINE,
Clerk Supreme Court of Kansas.

57 Here follows the petition for a writ of error, the assignments of error, a copy of the bond for appeal, the writ of error, and the citation with proof of service:

58 In the Supreme Court of the State of Kansas.

No. 16202.

THE MISSOURI AND KANSAS INTERURBAN RAILWAY COMPANY,
Plaintiffs in Error,
vs.
THE CITY OF OLATHE, Defendant in Error.

Petition for Writ of Error.

Considering themselves aggrieved by the final decision of the Supreme Court in rendering judgment against it in the above entitled cause, the plaintiffs in error hereby pray a Writ of Error from said

decision and judgment to the United States Supreme Court, and an order fixing the amount of a bond for costs.

Assignment of Errers herewith.

FRANK DOSTER,
A. F. HUNT, JR.,
HARVEY & ADDINGTON,
Attorneys for Plaintiffs in Error.

STATE OF KANSAS, SUPREME COURT, *ss:*

Let the Writ of Error issue upon the execution of a bond by The Plaintiffs in error above named, The Missouri and Kansas Interurban Railway Company, in the sum of $1000.00 Dollars.

Dated April 15, 1911.

W. A. JOHNSTON,
Chief Justice Supreme Court of Kansas.

59 In the Supreme Court of the State of Kansas, Saturday, April 15, 1911.

16202.

J. A. EDSON, Rec., etc., Appellant,
vs.
THE CITY OF OLATHE, Appellee.

Before Johnston, C. J.

At Chambers.

A petition for the writ of error now being presented it is ordered that said petition be allowed, and that a writ of error issue upon execution of a bond by the appellant to the City of Olathe in the sum of One Thousand ($1000.00) Dollars to be approved by this Court or one of the Justices thereof.

60 In the Supreme Court of the State of Kansas.

No. 16202.

THE MISSOURI AND KANSAS INTERURBAN RAILWAY COMPANY,
Plaintiff in Error,
vs.
THE CITY OF OLATHE, Defendant in Error.

Assignment of Errors.

Now comes the above named plaintiff and files herewith its petition for a Writ of Error, and says that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the United States Supreme Court makes the following assignments of error.

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The supreme court of Kansas erred in affirming an order of the District court of Johnston county in said state, sustaining a demurrer to the petition filed in said District Court in the above entitled action, in that there was drawn in question on the issue of law raised by said pleadings, and specially claimed by the plaintiff, a right, title or privilege under the Constitution of the United States, and the decision of said Supreme Court of Kansas was against said right, title or privilege so claimed.

The said errors are more particularly set forth as follows: The Supreme Court of Kansas erred—

First. Because it holds that an ordinance lawfully enacted and published by the Mayor and Councilmen of the defendant city granting a street railway franchise to the plaintiff company, and duly accepted and performed by it, which does not specifically engage the defendant in any private proprietary capacity and in which no private proprietary corporate object or advantage is sought, is not a contract that could be impaired (and the rights of the plaintiff in or under said franchise do not constitute property of which the plaintiff could not be deprived without due process of law) within the meaning of the Constitution of the United States.

Second. Because it did not hold, in construing said franchise, that certain corporate objects were sought by the defendant and were the consideration for said franchise, and that the acceptance and performance of its terms by plaintiff constituted a contract that could not be impaired (and created property rights in and under said franchise of which plaintiff could not be deprived without due process of law) within the meaning of the Constitution of the United States.

61 Third. Because it holds that in enacting said franchise ordinance the Mayor and Councilmen of the defendant city, were for the time the legal equivalent of the legislature of the state of Kansas; that their acts were wholly legislative and the franchise granted was public law passed in the general interest and promulgated by the sovereign authority of the state; that by reason of the premises no contract arose upon the publication and acceptance of the franchise that could be impaired (and no property rights in or under said franchise of which plaintiff could not be deprived without due process of law accrued then or thereafter upon the performance of the conditions of the franchise) within the meaning of the Constitution of the United States.

Fourth. Because while holding that the action of the Mayor and Councilmen of the defendant city in repealing said franchise was state action, within the meaning of the Constitution of the United States, it holds at the same time that an instrumentality of the state (a municipal corporation authorized by the state law to sue and be sued) was enabled to impair the obligations of the plaintiff's contract and deprive it of its property without due process of law, provided only in so doing it acted in a legislative as distinguished from a proprietary capacity.

Fifth. Because while holding that plaintiff had no right, title or interest in or under its franchise for the deprivation of which without due process of law it would be entitled to compensation in dam-

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ages in an action at law, it nevertheless recognized such rights in the plaintiff as would have entitled plaintiff to maintain a suit in equity against the defendant to have the repealing ordinance adjudged a nullity and the officers and agents of the defendant enjoined from interfering with the plaintiff in the enjoyment of its franchise rights.

Sixth. Because in holding that "the constitutional mandates invoked came to the city officials merely as rules to be observed in the performance of their governmental duties and not as special increments to the private corporate duties of the municipality," it holds that the violation of said mandates would entail no liability on the defendant city.

Seventh. Because it did not hold upon all the facts alleged in plaintiff's petition and admitted by the defendant's demurrer that the acts of the city in said petition complained of constituted
62 a taking of plaintiff's property without due process of law, for which plaintiff is entitled to damages in an amount equal value of said property.

Eighth. Because it held that the repeal by defendant city of plaintiff's franchise grant was not a deprivation of plaintiff of its property without due process of law, nor an impairment of the obligation of the defendant's contract.

For which errors the plaintiff, The Missouri and Kansas Interurban Railway Company prays that the said judgment of the supreme court of the state of Kansas dated the 12th day of December, 1910, be reversed and a judgment rendered in favor of the plaintiff and for costs.

FRANK DOSTER,
A. F. HUNT, AND
HARVEY AND ADDINGTON,
Attorneys for Plaintiffs in Error.

(Endorsed:) 16202. Filed April 15th, 1911. D. A. Valentine, Clerk of Supreme Court.

63 In the Supreme Court of the State of Kansas.

No. —.

THE MISSOURI AND KANSAS INTERURBAN RAILWAY COMPANY, William B. Strang, F. R. Ogg, J. C. Keepers, J. H. Cosgrove, and George H. Hodges, Plaintiffs in Error,

vs.

THE CITY OF OLATHE, Defendant in Error.

Bond on Writ of Error.

Know all Men by These Presents, That we, The Missouri and Kansas Interurban Railway Company, William B. Strang, F. R. Ogg, J. C. Keepers, J. H. Cosgrove, and George H. Hodges, as principals, and The Globe Surety Co. of Kansas City, Mo., as surety,

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are held and firmly bound unto The City of Olathe, Kansas, in the sum of $1000.00 Dollars, to be paid to the said City, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives, assigns, firmly by these presents.

Sealed with our seals and dated this 17th day of April, 1911.

Whereas, The above named plaintiffs in Error, The Missouri and Kansas Interurban Railway Company, has sued out a writ of errors to the Supreme Court of the United States, to reverse the judgment in the above entitled action by the Supreme Court of the state of Kansas.

Now, Therefore, The condition of this obligation is such that if the above named plaintiffs in error shall prosecute said writ to effect and answer all costs and damages, if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

THE MISSOURI AND KANSAS INTERURBAN RAILWAY COMPANY,
By W. B. STRANG, *President.*
GLOBE SURETY COMPANY OF KANSAS CITY, MISSOURI,
[SEAL.]
By J. Q. MILLS, *Vice-President.*

Attest:
WM. LITTLER,
Secretary.

Attest:
H. P. FORAS,
[SEAL.] *Assistant Secretary.*

(Endorsed:)16202. In the Supreme Court of the State of Kansas. The M. & K. Interurban Rly. Co., pl'tff in error v. The City of Olathe, Def't in error. Bond for Costs approved April 19th, 1911. W. A. Johnston, Chief Justice. Filed April 19th, 1911. D. A. Valentine, Clerk Sup. Court.

64 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between The Missouri and Kansas Interurban Railway Company, a Corporation, and The City of Olathe, Kansas, wherein was drawn in question the validity of an authority exercised under, the United States, and the decision was against its validity; and wherein was drawn in question the validity of an authority exercised under, said state, on the ground of its being repugnant to the Constitution and laws of the United

ates, and the decision was in favor of its validity; or wherein was rawn in question the construction of a clause of the Constitution the United States, and the decision was against the title, right, rivilege, or exemption specially set up or claimed under such clause the said Constitution; a manifest error hath happened, to the reat damage of the said plaintiffs in error, The Missouri and ansas Interurban Railway Company, a corporation, as by their mplaint appears. We being willing that error, if any hath been, hould be duly corrected, and full and speedy justice done to the arties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the nited States, together with this writ, so that you have the same n the said Supreme Court at Washington, within 30 days from the late hereof, that the record and proceedings aforesaid being inspected, he said Supreme Court may cause further to be done therein to orrect that error, what of right, and according to the laws and cus-oms of the United States, should be done.

Witness The Honorable Edward D. White, Chief Justice of the United States, the 19th day of April, in the year of our Lord one thousand nine hundred and eleven.

GEO. F. SHARRITT,
[SEAL.] *Clerk Circuit Court United States, District of Kansas.*

Allowed:
W. A. JOHNSTON,
Chief Justice Supreme Court of Kansas.

66 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the City of Olathe, Kansas, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the state of Kansas, wherein The Missouri and Kansas Interurban Railway Company, a corporation, William B. Strang, F. R. Ogg, J. C. Keepers, J. H. Cosgrove, and George H. Hodges, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, The Chief Justice of the Supreme Court of the state of Kansas, this 15 day of April, 1911.

W. A. JOHNSTON,
[SEAL.] *Chief Justice Supreme Court of Kansas.*

Attest:
D. A. VALENTINE,
Clerk Supreme Court of Kansas.

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OLATHE, KANSAS, *April* 19, 1911.

I, attorney of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

—— ——,
Attorney for the City of Olathe, Kansas.

67 *United States Marshal's Return.*

Received this writ at Topeka, April 22, 1911 and served the same upon the within named, The City of Olathe, Kansas, by delivering to C. W. Gorsuch, Mayor, a true and certified copy of this writ with all endorsements thereon, at Olathe, Kansas, on the 24th day of April, 1911.

WM. H. MACKEY, JR.,
United States Marshal, District of Kansas.
By B. F. F.,
Chief Office Deputy.

5.90 16,202.

68 SUPREME COURT.
State of Kansas, ss:

I, D. A. Valentine, Clerk of the said Court, do hereby certify that there was lodged with me as such clerk on April 19th, 1911, in the matter of The Missouri and Kansas Interurban Railway Company, a corporation, versus The City of Olathe, Kansas.

1. The original bond of which a copy is herein set forth.
2. Two copies of the Writ of Error, as herein set forth,—one for the defendant and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Topeka, Kansas, this 2nd day of May, 1911.

D. A. VALENTINE,
[SEAL.] *Clerk Supreme Court of Kansas.*

69 UNITED STATES OF AMERICA,
Supreme Court of Kansas, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I have hereunto subscribed my name, and affixed the seal of said Supreme Court of Kansas, in the City of Topeka, this 5th day of May, 1911.

D. A. VALENTINE,
[SEAL.] *Clerk Supreme Court of Kansas.*

Plaintiff's costs $—, paid by the Missouri and Kansas Interurban Railway Company.
Defendant's costs, $—, paid by ——.
Costs of transcript, $—, paid by The Missouri and Kansas Interurban Railway Company.

——— ———,
Clerk Supreme Court of Kansas.

70 In the Supreme Court of the State of Kansas.

No. 16,202.

J. A. EDSON, Receiver, etc., Plaintiff in Error,
vs.
THE CITY OF OLATHE, Defendant in Error.

I, D. A. Valentine, clerk of the supreme court of the state of Kansas do hereby certify that the above and foregoing is a full true and correct duplicate and reproduction of the transcript of the record in the above entitled case as the same appeared when fully prepared and transmitted to the Clerk of the Supreme Court of the United States; I do further certify that the above and foregoing is a full true and correct transcript of all the papers filed and all proceedings had in the above entitled case including the papers and pleadings relating to the suing out of a writ of error.

Witness my hand and the seal of the supreme court hereto affixed, at my office in Topeka, this 11th. day of July, A. D. 1911.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of the State of Kansas.

71 In the Supreme Court of the United States.

No. 16,202.

THE MISSOURI & KANSAS INTERURBAN RAILWAY COMPANY, Plaintiff in Error,
vs.
THE CITY OF OLATHE, Defendant in Error.

Affidavit.

STATE OF KANSAS,
Shawnee County, ss:

Frank Doster on oath says, he is one of the attorneys for the Missouri and Kansas Interurban Railway Company, plaintiff in error in the above entitled cause; that about May 8th, 1911, he forwarded to the Clerk of the Supreme Court of the United States at Washington, D. C., by Wells-Fargo Express a record of the above entitled cause as the same appears of record and on file in the office of the Clerk of the Supreme Court of Kansas, together with a

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petition for writ of error, assignment of errors, writ of error to the Supreme Court of Kansas, citation to defendant in error with United States Marshal's return of service thereon, and supersedeas bond for the purpose of having the same filed in the office of the said Clerk of the United States Supreme Court; that he took from the agent of said Wells-Fargo Express Company at Topeka, Kansas, a receipt for the package containing said record and papers; that he is informed by the agent of said Wells-Fargo Express Company at Topeka, Kansas, that said package was delivered in transit by his company to the United States Express Company at Kansas
72 City Missouri, and that agents of said United States Express Company have stated to him, the said agent at Topeka, Kansas, their inability to deliver said package, stating in writing as follows: "No doubt this package was destroyed in fire near Chicago "on B. & O. train No. 46, May 10th, 1911."

Affiant verily believes that said original record and papers forwarded as aforestated have been lost or destroyed and that the same cannot be filed as intended.

FRANK DOSTER, *Affiant.*

Subscribed and sworn to before me this 13th day of July, 1911.

[Seal J. Newell Abrahams, Notary Public, Shawnee Co., Kansas.]

J. NEWELL ABRAHAMS,
Notary Public.

My Commission Expires July 7, 1912.

73 [Endorsed:] No. 16,202. In the Supreme Court of the United States. The Missouri & Kansas Interurban Railway Co., Plaintiff in Error, vs. The City of Olathe, Defendant in Error. Affidavit.

Endorsed on cover: File No. 22,802. Kansas Supreme Court Term No. 726. The Missouri & Kansas Interurban Railway Company, plaintiff in error, vs. The City of Olathe, Kansas. Filed July 17th, 1911. File No. 22,802.

In the

Supreme Court of the United States

October Term, 1911.

No. 726.

THE MISSOURI AND KANSAS INTERURBAN RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE CITY OF OLATHE, KANSAS.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS.

The Judgment Rendered Was a Final One.

Objection is first made in this case that the record does not show that the judgment of the State Supreme Court is final. This claim requires a brief reference to the record, but a more particular one than has been made in the motion to dismiss. In the lower State Court the City, the defendant in error here, demurred to the plaintiff's petition for the sole reason that it did not state facts sufficient to constitute a cause of action. (Record 13.) The court rendered judgment

sustaining the demurrer. (Record 14.) On these proceedings, to-wit, plaintiff's petition, defendant's demurrer, and court's judgment sustaining the demurrer, error was prosecuted to the Supreme Court of the state, which "ordered and adjudged that the judgment of the court below be affirmed." (Record 15.) We suppose that the contention is that the lower court of the state or the Supreme Court of the state should have indicated by definite statement, in some form, that the litigation was finally ended adversely to the plaintiff, as by ordering the dismissal of its petition, or the like. Our contention is that if the decision of the State Supreme Court denying the plaintiff's case and the relief asked by it shows a final adverse decision, it is final, even though not formally expressed to be such.

The plaintiff's petition (Record 2 *et seq.*) shows the grant to the company by the City of an ordinance franchise to construct a line of street railway, a copy of the ordinance being attached to the petition and made a part of it. The petition further shows (Record 12) an unconditional repeal of the ordinance grant, a copy of the Repealing Act being likewise attached and made part of the allegations. Damages, the nature of which are set forth in the petition, resulted from the Repealing Act and the refusal of the City following it to allow the company the enjoyment of the granted franchise. It was *that* Act of repeal, and *that* act of refusal by the City, which constituted the company's cause of action. It was *that* repeal and *that* refusal which the Supreme Court of the state decided did not constitute any cause of action. The only case, and all the case, which the company had against the City was stated in its petition. It made a claim of damages consequent on the City's refusal to allow it its contract rights—the only contract rights it had or claimed to have against the City. The State Supreme Court decided that on the company's own state-

ment of its case it had no contract which the City could not and had not lawfully rescinded, and no rights which the City could not and had not lawfully denied. In its syllabus decision the court epitomized the view expressed in its opinion that the company had not and could not make any valid claim in damages against the City for the repeal of its ordinance grant. It said (Record 15):

> "A city is not liable in damages for the repeal of a street railway franchise ordinance which does not engage the city in any private proprietary capacity, nor for the conduct of its officers in publishing and subsequently enforcing the repealing ordinance."

Again, in denying the company's motion for rehearing, it ruled (Record 28) that:

> "The state does not guarantee the judgment or fidelity of its officers and agents in their conduct of political affairs, and municipal corporations, erected for purposes of local government, are not liable for misfeasances of their officers when acting in a governmental capacity with respect to matters of general public concern. The principle of *respondeat superior* does not apply in such cases."

If, after the Supreme Court's affirmance of the lower court, a right of amendment of the petition still existed (which probably was not the case), no amendment nor any different statement of its cause of action would have availed the company. It had already stated the only case it had. It counted on damages consequent on the repeal of its ordinance franchise and the refusal to allow it its franchise rights. When the court decided that such repeal and refusal constituted no valid cause of action, its case, under any form of statement, was at an end forever. The Supreme Court's affirmance of the lower court's order was, therefore, a final judgment, and entitles us

to ask the opinion of this Court whether the repeal of the ordinance grant was, as asserted by the court, in virtue of such sovereign legislative authority in the City as to exempt it from damages for its act. Beginning with *Martin* v. *Hunter*, 1 Wheat. 304, it has been ruled time and again that if the decision of the State Court finally determines the question of federal right adversely to the claimant, so that nothing remains to be done but the ministerial duty of carrying the judgment into effect, such judgment is final for purpose of review in this Court. *Mower* v. *Fletcher*, 114 U. S. 127; *Weston* v. *Charleston*, 2 Pet. 449; *Home Insurance Co.* v. *Augusta*, 930 U. S. 116; *Daniels* v. *Tearney*, 102 U. S. 415.

The Court's Judgment Denies a Claim of Federal Right.

A second ground of dismissal is that the State Court did not decide any claim of federal protection especially set up by the company. A sufficient reply to this is that if a claim of federal constitutional right was properly set up, and was necessarily involved in the case, the State Court's failure to decide it does not deprive this Court of jurisdiction to review the judgment. This rule is supported by a multitude of decisions, some of which are cited in the plaintiff's brief on the same subject in the companion case, No. 727, between the same parties herein.

It was not claimed in either of the two opinions of the State Court (Record 15 *et seq.* and 28 *et seq.*) that a claim of federal constitutional right was not set up by the company, nor is such claim made in the defendant's motion to dismiss, nor in its brief. On the contrary, it is admitted in the defendant's motion (page 3) that the claim was made, and, as defendant in its brief (page 8) observes, the court considered the question of the constitutional validity of the repealing ordi-

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nance, and held it invalid. The court, among other things, said (Record 29-30):

> "The Constitution of the United States is a paramount law of the land. The State Legislature and its agent and representative in this matter, the City Legislature, were bound to observe that law. From the face of the petition it appears the City did not do this and that, consequently, the repealing ordinance was void. If proper application had been made to any court of the state having jurisdiction the ordinance would have been adjudged to be a nullity, and all the officers and agents of the City would have been restrained and enjoined from enforcing the ordinance and from disturbing the plaintiff in the enjoyment of its franchise rights."

A copy of the company's abstract of record and brief on which it presented its case in the State Court is filed herewith. This pamphlet contains the specifications of error and a topical discussion of the points made, and shows that the claim of constitutional protection was distinctly set up and claimed. See pages 24, 29, 32. The claim of federal right thus distinctly set up and relied on in the State Court was necessarily involved in the case. No decision could properly have been made on any other ground than the one thus presented. The company claimed damages for the repeal of its ordinance grant, asserting that such repeal deprived it of property without due process of law, and was also an impairment of its contract obligation. The validity of that claim was admitted by the court—the Act of repeal was wrongful—it was in violation of the company's constitutional right. But it was said that the wrong remedy had been pursued—injunction would lie, but damages would not, the reason being that in the enactment of the repeal the City acted in a sovereign legislative capacity, and not in the capacity of a business agent. If that rule of remedy was meant to be asserted as a proposition of general

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jurisprudence and not of local law, a sufficient reply is that this Court is not bound by the decisions of the state courts on matters of general law; hence the question whether damages will lie against a municipal corporation for an invasion of a right guaranteed by the Federal Constitution, or whether injunction is the exclusive remedy, still remains for this Court to decide.

If, however, the State Court meant to decide as a matter of local law that damages would not lie for violated federal right—that injunction was the sole remedy—a conclusive reply is that it is not competent for a state, either by legislative Act or rule of judicial decision, to thus limit the remedy of aggrieved suitors. General rules of procedure may be prescribed which will be allowed if substantive methods be not impaired, but, given a federal right, and the state is powerless to say that the remedy for its violation shall be solely at equity, and no wise at law.

The proposition that this Court is not bound by decisions of the state courts on questions of general law, and that it is not competent for a state to deny to a litigant any of the ordinary remedies for the vindication of a claim of federal right, are so ingrained in our jurisprudence that citations to decisions will not be expected. They would be unnecessary.

But, over and beyond all other argumentation, and asking to be allowed the emphasis of italics, *if in the assertion of a claim of federal constitutional right, such as denial of due process, or impaired obligation of contract, there be a question whether damages or injunction is the exclusive remedy, such question is itself a federal one, and so likewise, of course, are all the subsidiary or included questions.*

This is not the time to discuss the basic proposition advanced by the State Court that the Act of ordinance repeal was governmental and not proprietary, and which it used as a

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postulate for its conclusion that injunction and not damages would lie; but it is not inappropriate to say that both premise and conclusion are at variance with the decisions of the federal courts.

In *City of Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, it was held that the grant of a right by a municipality to furnish water through pipes laid in the streets was the grant of a franchise vested in the state, the grantee of which came under the protective guaranties of the Federal Constitution, this regardless of the question whether the City, in making the grant, acted in a governmental or a proprietary capacity; and, replying to the argument that equity did not have jurisdiction because there was an adequate legal remedy, the court said that complainant had no present legal remedy because the threatened damages had not yet occurred, but that:

> "It is true that after the City shall have gone to the great expense of erecting a plant of its own and of entering into competition with the plaintiff company, the latter would doubtless have a remedy at law for breach of the covenant. In the meantime, great, perhaps irreparable, damage would have been done to the plaintiff."

There is not, of course, any difference between the case of a grant to lay mains and pipes in the streets of a city for the furnishing of water and the grant of a right to lay tracks and operate cars in the streets for the furnishing of transportation.

We respectfully submit that the motion to dismiss should be overruled.

FRANK DOSTER,
A. F. HUNT, JR.,
A. M. HARVEY,
J. E. ADDINGTON,
Counsel for Plaintiff in Error.

CLOSE IN CENTER

In the Supreme Court
OF THE UNITED STATES
October Term, 1911

THE MISSOURI AND KANSAS INTERURBAN RAILWAY COMPANY,
Plaintiff in Error.
vs.
THE CITY OF OLATHE, KANSAS,
Defendant in Error.
No. 726.

Motion to Dismiss and Brief and Argument of Defendant in Error thereon.

MOTION TO DISMISS.

Now comes the City of Olathe, Kansas, defendant in error and respectfully states to the Court that the plaintiff in error seeks by writ of error herein to have this court review and reverse a decision of the Supreme Court of the State of Kansas affirming the ruling of the District Court of Johnson County, Kansas, sustaining a demurrer to the petition of the plaintiff. The record fails to show that any final judgment has been entered in the case, and no review of a final judgment of the District Court was had in the state

Supreme Court, but only a review of an order sustaining the demurrer to the petition as allowed by section 542 of the Code of Civil Procedure, Ch. 80 Gen'l Statutes of 1905.

In the petition in error filed in the Supreme Court of Kansas the only errors assigned are that the District Court erred in sustaining the demurrer, and that it erred in not overruling the demurrer. No mention is made of any question under the constitution or laws of the United States. The petition under consideration alleged in substance that the Mayor and City Council of the City of Olathe had granted a franchise to the plaintiff to construct and maintain an interurban railway in the City of Olathe, by an ordinance duly passed and accepted by the plaintiff, and that thereafter the defendant repealed the ordinance and refused to permit the plaintiff to enter the city for the purpose of constructing and operating its line of railway. The plaintiff sought to recover damages from the city because of the action of the Mayor and Council in repealing the ordinance and denying the plaintiff the right to enter the city and construct its railway.

The specifications of error contained in the brief of the plaintiff in error in the Supreme Court of Kansas are as follows:

"The Court below erred in sustaining the demurrer

of the defendant in error to the petition of the plaintiff in error.

"Under this general specification of error the plaintiff in error complains that the Court below erred:

1. In holding that in the matter of granting the franchise set out in the petition, as well as in passing the repealing ordinance therein complained of, the defendant was exercising a governmental function and was not therefore liable to an action for damages even though its action was wrongful and resulted in great injury and damage to the plaintiff.

2. In holding that the City of Olathe was not liable to an action for damages for the enforcement of the repealing ordinance complained of, and its refusal to permit the plaintiff to use and enjoy its franchise.

3. In refusing to hold the defendant city liable to the plaintiff for the violation of an imposed duty, to-wit: The prohibition of the Federal Constitution against taking private property without the process of law."

The Supreme Court held that in granting the franchise and in passing the ordinance repealing it the city acted in a purely governmental capacity, as a local legislature, not as a corporate agency. The syllabus of the decision as promulgated by the court is as follows:

"A city is not liable in damages for the repeal of a street-railway-franchise ordinance which does not engage the city in any private proprietary capacity, nor for the conduct of its officers in publishing and subsequently enforcing the repealing ordinance."

Edson v. Olathe, 81 Kan. 328.

On a rehearing the Court further held that the repealing ordinance was void, but:

"The state does not guarantee the judgment or fidelity of its officers and agents in their conduct of political affairs, and municipal corporations, erected for purposes of local government, are not liable for misfeasances of their officers when acting in a governmental capacity with respect to matters of general public concern. The principle of *respondent superior* does not apply in such cases."

Id. 82 Kan. 4.

As the Court construed the petition the only act charged as a ground of liability was the act of passing and publishing the ordinance; there was no charge of any act of interference with the work of the plaintiff beyond a denial of its rights under the franchise. The Federal question was decided in favor of the plaintiff, the ordinance was held to be merely a void act of the Mayor and Council, which neither took away from nor conferred on the plaintiff any right.

Thereupon the defendant in error moves the Court to dismiss the writ of error herein upon the grounds and for the reasons following, to-wit:

1. The record does not show that any final judgment has been rendered in the action, and this Court has no jurisdiction to review or reverse the order of the Supreme Court of Kansas affirming the order of

the District Court sustaining the demurrer to the petition.

2. The Supreme Court of Kansas did not in this case decide any claim of title, right, privilege or immunity, especially set up or claimed by the plaintiff in error, under the Constitution of the United States, against the plaintiff in error.

3. This court has no jurisdiction of the subject matter of this cause or of any question presented by the record herein.

STEPHEN H. ALLEN,
Attorney for Defendant in Error.

BRIEF AND ARGUMENT.

I.

No Final Judgment is Brought to this Court for Review.

Section 709 of the Revised Statutes confers on this Court jurisdiction to review "A final judgment or decree in any suit in the highest court of a State" in the cases therein mentioned. The decision of the Supreme Court of Kansas, which the plaintiff in error seeks to have this Court review, is an affirmance of an order of the District Court sustaining a demurrer to the plaintiffs petition. The law of Kansas allows a review of this ruling without the rendition of a final judgment thereon. (Sec. 542, Ch. 80, General Statutes

of 1905.) When the demurrer was sustained the plaintiff had a right to amend the petition, if it chose to do so. Sec. 141 of said chapter provides: "If the demurrer be sustained, the adverse party may amend, if the defect can be remedied by way of amendment, with or without costs, as the court, in its discretion, shall direct." The record fails to show whether the plaintiff took leave to amend or stood on the petition as filed, and no judgment is shown to have followed the ruling on the demurrer. There is no final judgment or decree before this Court for review.

II.

The Supreme Court of Kansas did not decide any claim of title, right, privilege or immunity, especially set up or claimed by the plaintiff in error, under the Constitution of the United States, against the plaintiff in error.

In the opinion delivered on the first hearing the Court held that in passing the city ordinances under consideration the Mayor and Council acted in their legislative capacity, and not as the business agents of the city, and that their acts so done imposed no liability on the city, whether valid or invalid. The Court did not hold that the repealing ordinance was valid and exempted the city from liability under the first ordinance, but that the action of the city whether right

or wrong was not of a kind or quality to impose liability on the municipal corporation for damages. This brings the case clearly within the principle often announced by this Court that:

"It is axiomatic that in order to give this court jurisdiction on writ of error to the highest court of a state in which a decision could be had, it must appear affirmatively, not only that a federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, that it was actually decided, or that the judgment as rendered could not have been given without deciding it, and where the decision complained of rests on independent grounds not involving a federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any federal question that may also have been presented."

California Powder Works v. Davis, 151 U. S. 389, 393.

Eustis v. Bolles, 150 U. S. 361.

Mo. Pac. R. Co. v. Fitzgerald, 160 U. S. 556.

Gillis v. Stinchfield, 159 U. S. 658.

Seneca Nations v. Christy, 162 U. S. 283.

Dibble v. Bellingham Bay L. Co., 163 U. S. 63.

Harrison v. Morton, 171 U. S. 38.

Pierce v. Somerset R. Co., 171 U. S. 641.

McQuade v. Trenton, 172 U. S. 636.

Seeberger v. McCormick, 175 U. S. 274.

"It is equally well settled that where our jurisdiction depends upon the denial by a state court of a title,

right, privilege or immunity claimed under the Constitution or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was specially set up or claimed at the proper time and in the proper way, and that the decision was against the right so set up or claimed. *Schuyler Bank v. Bollong*, 150 U. S. 85, 88."

California Powder Works v. Davis, 151 U. S. 393.

The opinion of the Supreme Court of Kansas on the rehearing of the case removes any possible doubt as to the ground of the decision, for the court expresses the opinion that the plaintiff was right in claiming the invalidity of the repealing ordinance under the Constitution, but that the acts of the city set up in the petition were not such as would render the city liable to an action for damages.

"We are not authorized by the Judiciary Act to review the judgments of the state courts because their judgments refuse to give effect to valid contracts, or because those judgments in their effect impair the obligation of contracts. If we did, every case decided in a state court could be brought here when the party setting up a contract alleged that the court had taken a different view of its obligation to that which he had."

Knox v. Exchange Bank, 12 Wall. 370.

St. Paul, etc. R. Co. v. Todd Co., 142 U. S. 282.

Under the foregoing decisions it is manifest that, even if a final judgment had been entered against the plaintiff on the demurrer, there would still be no basis

for the jurisdiction of this court, and the writ of error would have to be dismissed.

We therefore respectfully submit that the writ of error herein should now be dismissed.

STEPHEN H. ALLEN,

Counsel for Defendant in Error.